No. 98.
Brf. of Van Alstyne for Appts.

Supreme Court U.S.
FILED
NOV 13 1902
JAMES H. McKENNEY,
Clerk.

Filed Nov. 13, 1902.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 98.

WILLIAM F. BOTSFORD, HENRY McMORRAN AND T. R. WRIGHT,

Appellants,

vs.

PATRICK SHEA.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Brief of Appellants.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 98.

WILLIAM F. BOTSFORD, HENRY McMORRAN AND T. R. WRIGHT,

Appellants,

vs.

PATRICK SHEA.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Brief of Appellants.

The certificate sets out the facts and the questions certified as follows:

"The appellee, Patrick Shea, exhibited his libel in the District Court of the United States for the Eastern District of Wisconsin, against the steam propeller Osceola, her tackle, apparel and furniture, to recover damages for personal injuries sustained under the circumstances herein stated.

At the hearing below, the District Court pronounced for the libellant awarding him damages for the injury sustained, and from the decree of that court in that behalf, the respondents below, the owners of the vessel, have appealed to this court.

The owners had supplied the vessel with a movable derrick for the purpose of raising the gangways of the vessel when in port, in order to discharge cargo. The appliance was in every respect fit and suitable for the purpose for which it was intended and furnished to be used, and at the time of the injury was in good repair and condition. The gangways which were to be raised by the derrick were each about ten feet long lengthwise of the ship, about seven feet high and weighed 1050 pounds. In the month of December, 1896, the vessel was on a voyage bound for the port of Milwaukee, and when within three miles of that port, and while in the open lake, the master of the vessel ordered the forward port gangway to be hoisted by means of the derrick, in order that the vessel might be ready to discharge cargo immediately upon arrival at her dock. At this time the vessel was proceeding at the rate of eleven miles an hour against a head of wind of eight miles an hour. Under the supervision of the mate, the crew, including the appellee, Patrick Shea, who was one of the crew, proceeded to execute the order of the master. The derrick was set in place to raise the gangway. As soon as the gangway was swung clear of the vessel, the front end was caught by the wind and turned outward broadside to the wind and by the force of the wind was pushed aft and pulled the derrick over, which in falling struck and injured the libellant. The negligence, if any there was, consisted solely in the order of the master that the derrick should be used and that the gangway should be hoisted while the vessel was yet in the open sea when the operation might be impeded and interfered with by the wind. The mate and the crew in executing the orders of the master of the vessel, acted in all respects properly, and were guilty of no negligence in the performance of the work. The libel charged negligence upon the owners of the vessel in 'requiring and permitting the work of unshipping said gangway to be done while said vessel was at sea and running against the wind.' The owners were not present upon the vessel, nor was the master a part owner of the vessel. It is contended that the vessel and its owners are liable for every improvident or negligent order of the captain in the course of the navigation or management of the vessel."

The questions of law upon which this court desires the advice and instruction of the Supreme Court, are—

First. Whether the vessel is responsible for injuries happening to one of the crew by reason of an improvident and negligent order of the master in respect of the navigation and management of the vessel.

Second. Whether in the navigation and management of a vessel, the master of the vessel and the crew are fellow servants.

Third. Whether, as a matter of law, the vessel or its owners are liable to the appellee, Patrick Shea, who was one of the crew of the vessel, for the injury sustained by him by reason of the improvident and negligent order of the master of the vessel in ordering and directing the hoisting of the gangway at the time and under the circumstances declared; that is to say, on the assumption that the order so made was improvident and negligent.

ARGUMENT.

The first question certified is as follows:

Is the vessel responsible for injuries happening to one of the crew by reason of an improvident and negligent order of the master in respect of the navigation and management of the vessel?

A proceeding *in rem* in the admiralty, is a proceeding to give effect to a maritime lien and such a lien must always exist to form the basis of such a proceeding.

Beane vs. The Mayurka, 2 Curt., 72.
The Rock Island Bridge, 6 Wall., 213, 215.
The Corsair, 145 U. S., 335, 347.

"The maritime privilege or lien is adopted from the civil law, and imports a tacit hypothecation of the subject of it. It is a *jus in re*, without actual possession or right of possession. It accompanies the property in the hands of a *bona fide* purchaser. It can be executed and divested only by a proceeding *in rem*. This sort of proceeding against personal property is unknown to the common law, and is peculiar to the process of the courts of admiralty."

The Yankee Blade, 19 How., 82, 89,
The Glide, 167 U. S., 606, 612.

The maritime lien then is but an incident, a security and does not exist in favor of one to whom the owner of the vessel is not

liable *in personam* founded upon some maritime contract or tort connected with the vessel.

It necessarily follows that the vessel is not responsible unless appellants are liable *in personam* to appellee under some law, maritime or state, for the damages caused by the negligent order of the master, and such law gave him a lien upon the vessel as security for the payment of his damages.

It is therefore evident that all the questions certified may properly be argued together, for if, by the law governing the case, whether it be maritime or state, the owner of a vessel is not liable to one servant for injuries caused by the negligence of a fellow servant, and if the master of a vessel in respect to acts done in the navigation and management of the vessel is a fellow servant of the seamen, the first question must be answered in the negative; the second in the affirmative and the third in the negative.

In *The Lottawanna*, 21 Wall., 558, Mr. Justice BRADLEY in judicially pronouncing the maritime law of this country observed:

"The maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country. * * * * The question as to the true limits of maritime law and admiralty jurisdiction is undoubtedly, as Chief Justice Taney intimates, exclusively a judicial question, and no state law or Act of Congress can make it broader (or it may be added), narrower, than the judicial power may determine those limits to be. *But what the law is within those limits, assuming the general maritime law to be the basis of the system, depends upon what has been received as law in the maritime usages of this country, and on such legislation as may have been competent to affect it.* To ascertain, therefore, what the maritime law of this country is, it is not enough to read the French, German, Italian, and other foreign works on the subject, or the codes which they have framed; but we must have regard to our own legal history, constitution, legislation, usages, and adjudications as well. The decisions of this court illustrative of these sources, and giving construction to the laws and Constitution are especially to be considered; and when these fail us, we must resort to the principles by which they have been governed." Pp. 572, 576.

What then has been received in the maritime usages of this country as the law of the liability of vessel owners to seamen injured in the service of the vessel?

The laws of Oleron relating to seamen, Art. 6, are as follows:

"If any of the mariners hired by the master of any vessel, go out of the ship without his leave, and get themselves drunk, and thereby there happens contempt to their master, debates, or fighting and quarreling among themselves, whereby some happen to be wounded: in this case the master shall not be obliged to get them cured, or in anything to provide for them, but may turn them and

their accomplices out of the ship; and if they make words of it, they are bound to pay the master besides; but if by the master's orders and commands any of the ship's company be in the service of the ship and thereby happen to be wounded or otherwise hurt, in that case they shall be cured and provided for at the cost and charges of the ship."

Appendix, to 30 Fed. Cas., p. 1174.

The Laws of Wisbury, Art. 18, are as follows:

"A mariner being ashore in the master's or the ship's service, if he should happen to be wounded, he shall be maintained and cured at the charge of the ship, but if he goes ashore on his own head, to be merry, and divert himself, or otherwise, and happens to be wounded, the master may turn him off, and the mariner shall be obliged to refund what he has received, and besides to pay what the master shall be forced to pay over and above to another whom he shall hire in his place."

Appendix, to 30 Fed. Cas., p. 1191.

The laws of Hanse Towns, are as follows:

"Art. 39, if any seaman is wounded in the ship's service, he shall be cured at the charge of the ship, but not if he is wounded otherwise."

Appendix, to 30 Fed. Cas., p. 1200.

The Marine Ordinances of Louis XIV., Sections 11 and 12, Title Fourth, provided as follows:

"If a seaman be wounded in the service of a ship, or fall sick during a voyage, he shall be paid his wages, and treated at the charge of the ship, and if he be wounded in fighting against enemies or pirates, he shall be cured at the charge of the ship and cargo. But if being on shore without leave he be wounded, he shall not be dressed at the charge of the ship, nor of the loading; and he may be dismissed, without pretending to any more than the wages that are due to him."

Appendix, 30 Fed. Cas., p. 1209.

It is no doubt true that the substance of these laws to the effect that if a seaman be wounded in the service of the ship or fall sick during the voyage, he shall be paid his wages and cured at the charge of the ship has been adopted in this country.

The Alexandria, 17 Fed. Rep., 390.

These laws, it is clear, are insufficient to give appellee a lien upon the vessel for damages based on mental and physical pain and loss of earning capacity.

After diligent search the writer has been unable to find anything

tending to show that there is any *general* maritime law giving a seaman injured in the service of the ship by the negligence of the master or other officers a cause of action against the owner and a lien upon the ship for damages based on physical and mental pain and loss of earning capacity. The general maritime law is silent upon the subject of such damages, in consequence of which it is certain that this country has not adopted anything on that subject from the general maritime law.

Nor has the writer been able to find any Act of Congress or reported case tending to show that there is any maritime law of this country giving a seaman injured in the service of the ship by the negligence of the master or other officer, a cause of action against the owner, and a lien upon the ship for damages based on physical and mental pain and loss of earning capacity. In short, the maritime law of this country is, for some reason, silent upon the subject under consideration.

What law, then, governs this case?

"We must always remember that the court cannot make the law, it can only declare it. If, within its proper scope, any change is desired in its rules, other than those of procedure, it must be made by the legislative department."

The Lottawanna, 21 Wall., 576, 577.

It was also held in *The Lottawanna* that the court could not in any event create a lien, "since a lien is a right of property and not a mere matter of procedure." P. 579.

As the maritime law of this country is silent in respect to the claim made in the libel, and as the case must be decided according to law, it is evident that the court must—if it has the right so to do—apply the municipal law, for as we have already seen it cannot extend the maritime law beyond its established limits. It is, however, submitted that as the appellee resorted to a libel *in rem*, the court is bound by the maritime law.

Homer Ramsdell Trans. Co. vs. La Compagnie Gen. Trans., 182 U. S., 406.

It is further submitted that by the maritime law of this country the liability of the vessel owner, in cases like the present, is limited to medical and surgical attendance, and wages to the end of the voyage.

In the *City of Alexandria, Supra*, the cook fell through the hatch, which had been negligently left open. He was cared for at the expense of the ship and was paid his wages to the end of the voyage.

Afterwards he resorted to a libel *in rem* to recover additional compensation, and it was held that by the maritime law his right to compensation was limited to that which he had received. In passing upon the question the court observed:

"When the owners perform all that can be reasonably done on their part by the proper equipment of the vessel for the voyage, and the selection of competent officers and a sufficient crew, no reason exists in natural justice for holding them or their vessel answerable for accidents to seamen which happen during the voyage beyond the limits which the maritime law has established."

In *The City of Norwalk*, 55 Fed. Rep., 107, the court observed:

"It must be borne in mind that the maritime law is not in itself a complete and perfect system. In all maritime courts there is a considerable body of municipal law that underlies the maritime as the basis of its administration. *Strictly speaking, the maritime law is that alone which is peculiar to, or which specially concerns maritime transactions.*"

The transaction in question was certainly a maritime transaction and it would seem that the case should be decided under maritime law unless some state law that may be enforced by the court affects the case.

There are, however, some reported cases in admiralty, which will be referred to presently, holding that a seaman injured in the service of the ship by the negligence of the master, has a cause of action to recover damages from the owner for such personal injury, but there is, it is believed, no reported case holding that he has a lien upon the vessel, and the cases holding the owner liable *in personam* are rested on the common law, as that law was understood by the courts deciding them.

Prior to the decision of *Ross vs. Railway Company*, 112 U. S., 377, decided December 8, 1884, and overruled in *Railway Company vs. Conroy*, 175 U. S., 323, there is, it is believed, no reported case in the Federal Courts of a suit by a seaman against a vessel, or its owners to recover damages for a personal injury caused by the negligence of the master in the navigation or management of the vessel, excepting *Daub vs. Railway Company*, 18 Fed. Rep., 625, decided in 1883, in which the court in charging the jury, ruled that neither the master nor the mate of a vessel (the defendant was a carrier by water) were fellow servants of a seaman. The right to recover, however, was based upon the negligence of the master, the incompetency of the mate and negligence of the owner in employing the mate. If the owner negligently employed an incompetent mate and the incompetency of the mate contributed to the injury, the owner was of course liable under the rules of the common law, which appears by the report of the case, to have been the law applied to the facts.

In *The Titan* and *The Hills*, 23 Fed. Rep., 313, decided in 1885, it was held that a deck hand and the pilot were not fellow servants.

In *The A. Heaton*, 43 Fed. Rep., 592, it was held that a seaman and the master are not fellow servants.

In *The Sachen*, 42 Fed. Rep., 66, decided in 1890, it was decided that common seamen are fellow servants.

In *McCullough's Adm. vs. N. Y., etc., Steamboat Co.*, 20 U. S. App., 570, the owner of a vessel was held liable to the engineer for personal injuries caused in part by the negligence of the master.

These suits were all *in personam* in admiralty, but the rules of the common law were followed, and the decisions were rested entirely upon the *Ross* case.

In *Quin vs. Lighterage Co.*, 23 Fed. Rep., 363, the master and a common seaman were held to be fellow servants upon the ground that the negligent act of the master which caused the injury was one that any co-servant in the same employment might have performed.

In *Olsen vs. Navigation Co.*, 44 C. C. A., 51, brought by a libel *in personam*, the ship carpenter and the master were held to be fellow servants, and the decision was rested upon the recent case of *Railway Company vs. Conroy*, 175 U. S., 323.

These cases were therefore decided according to the common law.

In *Quebec Steamship Co. vs. Merchant*, 133 U. S., 375, it was held that the porter, the carpenter and the stewardess of a steam vessel were fellow servants, and that the owners of the vessel were not liable to the stewardess for damages caused by the negligence of the porter and the carpenter.

This case was brought in a state court and removed into a circuit court of the United States, and the court, no doubt, had the right to decide the case upon the land laws, instead of upon the sea laws.

> *Homer Ramsdell Co. vs. LaCompagnie Gen. Trans., supra.*

If, however, the second question certified is to be decided under the common law, then it is certain that the master of the vessel and appellee were fellow servants, and that the owners of the vessel are not liable for the damages sustained.

> *Railway Co. vs. Conroy*, 175 U. S., 323.

There are cases in other jurisdictions in which facts similar to those in the case at bar have been passed upon.

In *Gabrielson vs. Waydell*, 135 N. Y., 1, the owners of a vessel were sued for damages caused by the willful and malicious act of their captain in assaulting and injuring a seaman while upon the

high seas, and the court held that considering that the case should be determined upon the principles of the maritime law, it could not say that those principles establish any rule differing from the common law rule. The Judge writing the opinion, observed:

"I am not satisfied that there is any principle of the law which intends, or that any consideration of public policy demands, that the owners shall come under any obligation to indemnify a member of the ship's company against such negligence or tortious acts of the captain."

In *Hedley vs. Pinkey & Sons Steamship Co.*, 1 L. R. Q. B. (1892), 58, the owners of a vessel were sued for damages caused by the death of one of the crew. The gangways of the vessel reached to the deck, which necessitated the use of a portable railing above the gangway; this portable railing was removed for the purpose of taking out the gangway and the captain allowed the vessel to go to sea without causing the railing to be replaced; while at sea a storm arose and a seaman was washed overboard by reason of the failure of the captain to cause the rail to be replaced. *Held*, that the captain and the seaman lost were fellow servants engaged in a common employment, and that for the damage resulting the owners were not liable.

In *Kalleck vs. Deering*, 161 Mass., 469, it was held, that the owners of a coasting vessel are not liable for injuries occasioned to a seaman on board the vessel while in port, and in command of the mate, by the breaking of a triangle on which the seaman was sitting and scraping the mast, where they have furnished proper materials for the construction of the triangle, and the injury is caused by the negligence of the mate in constructing it and in ordering the seaman to use it.

Now as sated *supra*, it is submitted that as the suit at bar is *in rem*, it must be decided under the maritime law and that under that law the liability of the owner of a vessel in cases like the present is limited to medical and surgical attendance and wages to the end of the voyage. But if the court has the right to apply to this case any part of the municipal law, sound reason and natural justice requires only that the owner of the vessel shall be bound to use reasonable care to furnish a seaworthy vessel, sufficient and safe appliances, and sufficient and competent seamen and officers, and that the law of assumption of risk should be applied to the seamen.

The master of a vessel, it is true, is vested with considerable power over the seamen, but he has not the power exercised by masters under ancient maritime law. He has, however, power to compel obedience by the seamen to his orders issued in the navigation and management of the vessel, by forfeiture of wages and imprisonment. R. S., Sec. 4596. But whatever power the master has,

he is invested with it *by the maritime law*, not by the owner of the vessel. The seaman knows this when he enters into his contract with the owner of the vessel and he impliedly promises to obey all lawful orders of the master, given in the navigation and management of the vessel. Why, then, is it not just and proper to say that he accepts the risk of injury from negligent orders given by a competent master in the navigation and management of the vessel?

There is, however, another question to be determined:

Is there any statute of Wisconsin which gave appellee a lien upon the vessel?

The constitution of Wisconsin fixes the center of Lake Michigan as the eastern boundary of the state, and expressly provides that the state has concurrent jurisdiction of all rivers and lakes bordering on the state so far as such rivers or lakes shall form a common boundary. Art. II., Sec. 1; Art. IX., Sec. 1.

The locality of the tort in question was in Lake Michigan about three miles from Milwaukee, and it may be that the legislature has power to create a lien for damages caused at the locality in question.

Section 3348, Revised Statutes of Wis., 1898, in force at the time of the accident to appellee, provides that every ship, boat or vessel used in navigating the waters of that state shall be liable for all damages arising from injuries done to persons or property by such ship, boat or vessel, and that the claims for such damages shall constitute a lien on such ship, boat or vessel which shall take precedence of all other claims or liens thereon.

What is the construction due to this statute?

The most reasonable and proper construction of this statute makes it apply to cases where the ship itself, and not one of its appliances, directly produces the damage as the last link in the chain of events commencing with negligence or misconduct in the navigation of the vessel as the first or proximate cause, and it is submitted that such is the construction due to this statute.

Assuming, however, that this statute extends to damages immediately caused by an appliance of the ship as the last link in the chain of events commencing with negligence in the management of the vessel as the proximate cause, it only makes the vessel liable in cases where its owner is liable *in personam* under other laws of the state. In other words, it does not create a cause of action, but merely a right in property in cases where the negligence or misconduct causing the damage gives rise to a cause of action *in personam*, and it means at most that when the owner of the vessel is liable *in personam* for the damages resulting from the tort, the person damaged shall have a lien upon the vessel to the amount of his damages.

There is no statute of Wisconsin making the owners of vessels

liable *in personam* under the facts certified in this case, hence it is clear that the question must be determined upon general law.

The Federal Courts enforce liens, created by State Statutes, upon vessels, when such statutes are not in conflict with the laws and usages of the United States, because, and only because, the lien touches a subject within the constitutional jurisdiction of the Federal Courts, and it necessarily follows that they cannot go beyond the State or Municipal Law creating the cause of action and lien.

Bigelow vs. Anderson's Adm., 34 U. S. App., 261, 273.
The City of Norwalk, 55 Fed. Rep., 98, 107, 108, 112.
Sherlock vs. Alling, 93 U. S., 104.
The Corsair, 145 U. S., 347.

It is, however, well settled that where a cause of action depends upon general law, the Federal Courts are not bound by the State decisions. Thus in *Baltimore & Ohio R. R. Co. vs. Baugh*, 149 U. S., 368, 370, Mr. Justice BREWER, in determining who are fellow servants, observed:

"This is not a question of local law, to be settled by an examination of the decisions of the Supreme Court of Ohio, the state in which the cause of action arose, and in which the suit was brought, but rather one of general law, to be determined by a reference to all the authorities, and a consideration of the principles underlying the relations of master and servant."

By the common law of Wisconsin the master is not liable to his servant for a personal injury caused by the negligence of a fellow servant, and whether the relation of fellow servants exists, in a given case, is not to be determined by the rank or grade of the offending servant, but by the nature of the act in the performance of which the injury was inflicted, without regard to the rank of the offending servant. If the negligence of the servant causing the injury was in respect to an act that the law implies a contract duty on the part of the master to perform, and the offending servant has been charged by the master with the performance of that act, then such servant is an agent of the master, but as to all other acts he is a fellow servant of the servant injured.

Dwyer vs. Am. Ex. Co., 82 Wis., 307-310.
Stutz vs. Armour, 84 Wis., 623.
Cadden vs. Am. Steel Barge Co., 88 Wis., 409.
Hartford vs. Railway Co., 91 Wis., 374.
Klochinski vs. Shores Lumber Co., 93 Wis., 417.
McMahon vs. Ida Mining Co., 95 Wis., 308.
Albrecht vs. Railway Co., 108 Wis., 530, 538.

In *Wiskie vs. The Montello Granite Co.*, 111 Wis., 443, 449, 450, nearly all of the Wisconsin cases are cited, together with many from the Supreme Court of the United States, including *New England R. R. Co. vs. Conroy*, 175 U. S., 323, and the court reaches the conclusion that the rule for determining who are fellow servants, is the same in the state and Federal Court.

Stated shortly the rule in Wisconsin is this:

All servants charged by the master with the duty of furnishing another servant with a place to work, or with appliances to work with, or with fellow servants, is an agent of the master for those purposes, but in every other case all servants of a common master, engaged in the same general undertaking, are fellow servants.

None of the Wisconsin cases cited involve maritime torts; there are, however, two such cases closely, at least, analogous in their facts, in which different conclusions were reached.

In *Thompson vs. Herman*, 47 Wis., 602, a member of a crew of a vessel sailing on Lake Erie, sued the owners—*one of whom was master*—to recover damages for a personal injury. The complaint alleged in substance that while the vessel was pitching and rolling heavily the jaw rope of the main gaff parted and caused the gaff to swing into the main rigging; that the plaintiff, with other seamen, was ordered by the master to adjust the gaff by standing upon the lower boom and pulling upon the bow line fastened to one of the horns of the jaw of the gaff; that the horn was very smooth and slippery, and for that reason the bow line was likely to slip from it when pulled upon, which facts were known to the master; that the plaintiff thinking it unsafe to obey the order of the master, objected and protested against the same and informed the master that the gaff could be adjusted by means of tackle, then at hand, with safety to all concerned; that the master refused to permit its use and imperatively ordered the work to be done in the way stated; that plaintiff obeyed and while pulling on the bow line, it slipped from the horn and caused the injury complained of.

The defendant demurred to the complaint, the demurrer was sustained and plaintiff appealed. Upon the argument of the appeal defendant claimed only that plaintiff assumed the risks and hazards of the business, and the court held, in substance, that the duty of a common seaman to yield unquestioning obedience to the commands of the master outside of port removed the case from the objection. It is difficult to tell what law the decision is based upon, but it would seem that the court supposed that it rested the decision upon the maritime law. Every maritime case cited, however, has relation to the liability of the vessel and its owners for injuries to cargo and have no relation to the question of the liability of the vessel and its owners to the crew for the negligent acts of the master in the navigation or management of the vessel.

In *Matthews vs. Case*, 61 Wis., 491, the mate of a vessel sued the owners for damages resulting from an injury caused by the negligence of the master. The complaint alleged, in substance, that the master negligently loaded and overloaded the vessel; that in consequence of such negligence the vessel sprung a leak; that afterwards a storm arose causing the vessel to leak badly; that at the time the vessel had not the usual appliances for securing the yawl boat and that it was, by the master's orders, negligently placed on the deck unfastened; that the hatch, near the yawl boat, was not fastened down and plaintiff attempted to fasten it; that while so engaged, the master, being at the wheel, negligently steered the vessel into the trough of the sea; that by reason thereof the vessel rolled and large quantities of water came on deck, and washed the yawl boat against the plaintiff and broke his leg. The complaint was demurred to; the demurrer was overruled and defendant appealed. After stating the foregoing facts the Supreme Court observed:

"It will be seen that whatever negligence there was, either in improperly loading the vessel, or in placing the yawl boat on deck without securely fastening the same, or in negligently steering the vessel into the trough of the sea, was the negligence of the master alone. There is no averment that the vessel was not properly equipped when she left the port of Milwaukee. It is only alleged that when the schooner encountered the storm there were not the usual and proper mechanical appliances upon the vessel for carrying and securing the yawl boat on deck. But *non constat* such appliances had not been furnished by the owner. If there were any omission of duty on the part of the owners in that regard, or in failing to equip the vessel properly on the outset of the voyage, or in the selection of a competent master, the fact should have been distinctly alleged. But the inference is irresistible, from the facts stated, that the injury was caused solely by the negligent acts of the master—unless there were contributory negligence—against which the owners could not guard. The owners were not present, and it was impossible for them to attend to the loading of the vessel, or to direct her management on the voyage. From the necessity of the case these duties had to be entrusted to the master and crew. On what ground, then, can it be claimed that the owners are responsible to the plaintiff for an injury resulting from the negligence of the master in loading and managing the vessel? Were not the mate and the master fellow servants, engaged in the same employment or common service? It seems to us they must be so regarded, and that the case comes within the familiar rule of law, which has been so frequently announced, by this and other courts, that the employer is not responsible for an injury to one employe through the negligence of another employe engaged in the same service or undertaking. There is no fact stated that will take the case out of that rule of law."

It will thus be seen that the court held in *Matthews vs. Case*, that in the matter of the navigation and management of the vessel, the master and mate were fellow servants. The case on its facts cannot be distinguished from *Thompson vs. Herman, supra*, as the duty of the mate of a vessel in respect to yielding obedience to the commands of the master is no different from that of a common seaman.

It is therefore apparent that the rule for determining who are fellow servants is the same in the State and Federal Court; that under the facts certified appellee and the master of the vessel were fellow servants and that the owners are not liable under the laws of the state.

In conclusion it is respectfully submitted that the first question should be answered in the negative, the second in the affirmative, and the third in the negative.

C. H. VAN ALSTINE,
Counsel for Appellee.